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Regulating Rites: Legal Responses to Female Genital Mutilation in the West

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REGULATING RITES: LEGAL RESPONSES TO FEMALE GENITAL MUTILATION IN THE WEST

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> What would a Sudanese woman think if she were to hear about the women of America who have their ribs removed to appear thinner, their faces lifted to appear younger, and their noses made smaller and breasts made larger, all in the desire to become more attractive? How, in turn, would these American women feel if they were told that their actions were barbaric or immoral, or if they were prohibited by law to have such operations?[1]

INTRODUCTION

On September 30, 1996, President Clinton signed into law the Department of Defense Omnibus Appropriations Bill.[2] Buried within the bill was a provision criminalizing "Female Genital Mutilation" (FGM) in the United States.[3] FGM is "the collective name given to several different traditional practices that involve the cutting of female genitals."[4] The name of this practice is widely

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1 Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437, 463 (1988).

2 Pub. L. No. 104-208, 110 Stat. 3009-708 (1996).

3 *Id.* § 645 (codified as amended at 18 U.S.C. § 116 (1997)). Section 116(a) provides, "[w]hoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both." *Id.* § 116(a).

4 NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 3 (1993). *See also* FRAN HOSKEN, THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES 8 (4th ed. 1994). The age at which females undergo this

contested.[5] This comment alternates use of the phrase FGM, the term the law uses, with the term female circumcision (FC). The choice to use the term female circumcision is not intended to minimize its potential hazards,[6] but rather to reinforce the notion that it is not done with the intent to harm, but for a series of religious beliefs and

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"cutting" varies among different societies. Most often it is performed on adolescents as a "coming of age" ritual, but sometimes it is performed on babies, on women just prior to marriage, or during or immediately proceeding a woman's first pregnancy. *Id. See generally* Sandra D. Lane & Robert A. Rubinstine, *Judging the Other: Responding to Traditional Female Genital Surgeries,* 26 HASTINGS CENTER REP. 31, 32 (1996) (discussing the three forms of the practice: (1) sunna, the removal of the tip of the clitoris, the least common form; (2) excision, the removal of the clitoris and/or the labia minora; (3) pharonic circumcision or infibulation, the removal of all external genitalia and the sewing together of the labia majora, with a small passageway left for urination and menstruation). The act is usually performed by midwives with a knife, sharp stone, or razor blade, most-often without sterile instruments or anesthesia. *Id.* at 35. All three types of circumcision are prohibited by the new U.S. law.

See also HOSKEN, *supra,* at 71–86 for information concerning the origins of the practice. FGM it is thought to be indigenous to Africa, dating back to Pharonic Egypt. It is customarily practiced in Africa—Egypt, Sudan, Ethiopia and Somalia in the East across central Africa to Senegal, Mali and Nigeria in West Africa, and all countries in between. It is also traditionally practiced in parts of the Middle East—the Southern Arabian peninsula states of Yemen and Oman, and the Persian Gulf states of Bahrain and United Arab Emirates. FGM is also practiced in some parts of Malaysia and Indonesia in Southeast Asia. *Id.*

[5] *See Note, What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision,* 106 HARV. L. REV. 1944 (1993); Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide,* 8 HARV. HUM. RTS. J. 1 (1995); Isabelle R. Gunning, *Arrogant Perception, World Traveling and Multicultural Feminism: The Case of Female Genital Surgeries,* 23 COL. HUM. RTS. L. REV. 189 (1992); Lane & Rubinstine, *supra* note 4, at 31.

[6] An account of the medical problems associated with FGM are beyond the scope of this comment. For a full discussion of this issue, see TOUBIA, *supra* note 4, at 12-19; HOSKEN, *supra* note 4, at 31–56.

cultural traditions.[7]

This comment examines the legislative responses to FGM by western legal systems, with a focus on the new U.S. federal law.[8] Section One examines the substance of the U.S. federal law, its logical implications and factors which influenced its passage. Section II examines state laws prohibiting FGM. Section III looks at the legal response of several Western European countries to FGM. An exploration of potential Constitutional problems with the new U.S. legislation follows in Section IV, focusing on whether the law is an unconstitutional burden on the free exercise of religion and whether it is beyond Congresses' power to regulate this practice. Section V presents the primary arguments against the criminalization of FGM on an international level and examines the potential relevance of these arguments to the domestic law.

I. THE FEDERAL LAW

The first federal law regulating FGM in the United States was passed on April 26, 1996.[9] It defines FGM as "the removal or infibulation (or both) of the whole or part of the clitoris, the labia minora, or labia majora."[10] Congressional findings preceding the substance of the bill conclude that FGM is "carried out by members of certain cultural and religious groups within the U.S." and that FGM often has adverse effects on a woman's physical and

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[7] *See Note, supra* note 5, at 1946. The use of this term is not intended to imply that female circumcision is similar to male circumcision. For a detailed look at the legal and human rights implications of male circumcision, see Abbie J. Chessler, Comment, *Justifying the Unjustifiable: Rite v. Wrong*, 45 BUFF. L. REV. 555 (1997).

[8] This comment does not attempt to explore the cultural, ethical and human rights debates about the practice itself. For a thorough discussion of such issues, see L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997); Lewis, *supra* note 5; Gunning, *supra* note 5.

[9] Pub. L. No. 104–134, 110 Stat. 1321–250, § 520. *See supra* note 3 and accompanying text.

[10] *Id.* § 520(c).

psychological health.[11]

Finding that there is a population at risk of undergoing the procedure in the United States, the bill requires the Department of Health and Human Services (HHS) to collect data on the number of women in the country who have been circumcised, either here or in their country of origin, and to specify the number under the age of 18.[12] In addition, § 520 requires HHS to identify affected groups and to design outreach and education programs to "educate individuals in the communities on the physical and psychological health effects of such practice."[13] The outreach must be "designed and implemented in collaboration with representatives of the ethnic groups practicing such mutilation and with representatives of organizations with expertise in prevention."[14] The outreach and education provision also requires medical schools to provide training for students in the treatment of FGM related health complications.[15]

The second federal regulation of FGM was included within the Department of Defense Omnibus Appropriations Act.[16] Section 116 criminalizes the act of circumcising a minor, and provides that "whoever knowingly circumcises, excises, or infibulates . . . any person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both."[17] The law

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[11] *Id.* § 520(1)–(2).

[12] *Id.* § 520(b)(2); *See also* Update on FGM, provided by Rep. Schroeder's office (on file with author). HHS has found that there are 168,000 women in the U.S. who have already been or are at risk of being circumcised. Of those at risk, 78,000 are children. The majority live in Atlanta, Georgia; Boston, Massachusetts; Los Angeles and Oakland, California; Chicago, Illinois; Newark, New Jersey; New York, New York; Philadelphia, Pennsylvania; Dallas and Houston, Texas; and Washington, D.C. *Id.*

[13] 110 Stat. 1321-250, § 520(b)(2); *See also Update on FGM, supra* note 12. In compliance with this section of the law, HHS held a conference on October 3, 1996 to gather advice from experts on how to accomplish its new mandate. *Id.*

[14] *Id.* § 520(b)(2).

[15] *Id.* § 520(b)(3).

[16] Pub. L. No. 104–208, 110 Stat. 3009–709, amending 18 U.S.C. § 116 (1997). The law went into effect Mar. 29, 1997.

[17] *Id.* § 116(a).

excepts surgeries which are necessary to the health of the patient and are performed by a licensed physician.[18]

Section 116 specifically discounts the justification that FGM is a religious or cultural requirement and that those practicing FGM should therefore be exempt from prosecution. It warns that, "no account shall be taken of the effect on the person on whom the operation is to be performed of any belief . . . that the operation is required as a matter of custom or ritual."[19] This section also contains a Congressional finding that the prohibition of FGM does not violate any of the rights guaranteed by the First Amendment.[20] The Congressional finding indicates an awareness by the law's drafters of a potential free exercise of religion violation, and attempts to dismiss it peremptorily.

The law also requires the Immigration and Naturalization Service (INS) to provide "all aliens who are issued immigrant or non-immigrant visas" with information regarding the health risks and legal consequences of continuing the practice in the United States.[21] Such information is required to detail the "severe harm to physical and psychological health" caused by FGM.[22] Moreover, immigrants must be notified of the "potential legal consequences" for both performing FGM or "allowing a child under his or her care to be subjected to female genital mutilation."[23] The law does not specify in what form, oral or written, the information will be presented, or even in what languages it will be made available. However, it does require

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[18] *Id.* § 116(b).

[19] *Id.* § 116(c).

[20] Pub. L. No. 104–208, Div. C, Title VI, Subtitle D § 645(a)(5), 110 Stat. 3009–708. "[T]he practice of female genital mutilation can be prohibited without abridging the exercise of any rights guaranteed under the First Amendment to the Constitution or under any other law." *Id.*

[21] Pub. L. No. 104–208 § 644(b), amending 8 U.S.C. § 1374 (1997). The law requires the Commissioner of the Immigration and Naturalization Service to consult with the Secretary of State in order to limit the "provision of information [regarding FGM] . . . to aliens from such countries." *Id.* § 1374(b).

[22] 8 U.S.C. § 1374(a)(1).

[23] *Id.* § 1374(a)(2).

that such information shall be "compiled and presented in a manner which is limited to the practice itself and respectful to the cultural values of the societies in which such practice takes place."[24]

Although both the performance of FGM on a minor and consenting to the practice on one's child are prohibited, the law does not prevent parents from taking their children abroad to undergo FGM. In fact, this practice may become increasingly prevalent with FGM's criminalization.[25] In a statement concerning an earlier version of the law, Senator Reid acknowledges the law, by omission, allows women 18 and older to undergo consensual circumcision. Reid noted "[a]lthough I believe this practice is a torturous act when performed on any woman, I am most concerned about it being performed on children and young girls under the age of 18 . . . in other words below the age at which a child can give consent."[26] Similarly, the bill fails to assign criminal liability to one who performs this procedure on a consenting adult.

There are no enforcement provisions in the amended § 116 or § 1374. There are no "mandated reporters" as there are with many state child abuse laws, in which teachers, social workers and medical

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[24] *Id.* § 1374(i). *See also* Pub. L. No. 104–208, Div. A, Title I § 101(c), Title V § 579, 110 Stat. 3009–170, amending 22 U.S.C. § 262k–2 (1997). The new federal law also contains a provision requesting the Executive Directors of international financial institutions to vote against giving loans to foreign governments which do not have education initiatives designed to eliminate FGM. This provision, the question of whether FGM is grounds for asylum, and domestic efforts to end FGM in other countries, are beyond the scope of this comment. *Id.*

[25] *See, e.g.*, Linda Burstyn, *Female Circumcision Comes to America*, ATLANTIC MONTHLY, Oct. 1995, at 28 (relating the story of "Azza," an Egyptian immigrant living in Louisiana who "plans to take her ten year old American born daughter back to Egypt in a few months to have her circumcised."); Celia W. Dugger, *Tug of Taboos*, N.Y. TIMES, Dec. 28, 1996, at 1. Dugger relates the story of Ahmed Guled, a Somali refugee living in Houston, Texas who "would, if necessary, take his 17 month old daughter out of the U.S. when the time comes [for her circumcision] in six or seven years." *Id.*

[26] *Congressional Press Releases, Statement By Senator Harry Reid Regarding the Federal Prohibition Of Female Genital Mutilation Act of 1995*, July 17, 1995, *available in* LEXIS, News Library, Arcnws File [hereinafter *Reid Press Release*].

practitioners are required to report to a state agency children they reasonably suspect have been abused.[27] Indeed the inherently private nature of the practice will make detection difficult. Furthermore, the law does not specify whether the federal government or a particular agency such as INS or HHS would prosecute parents, practitioners or both. The failure to provide enforcement methods makes the law appear more symbolic than actually prohibitive. Although the language of the bill is both educational–gathering information on at-risk communities and informing immigrants of the law, as well as punitive—subjecting violators to fines and imprisonment, the lack of enforcement mechanisms makes the law appear more rhetorical than pragmatic.[28]

Senator Harry Reid (D-Nevada) and Representative Patricia Schroeder (D-Colorado) sponsored the legislation. Senator Reid began his campaign to end FGM after learning about it from a Cable News Network (CNN) broadcast in September, 1994. The news segment graphically depicted the circumcision of a young Egyptian girl.[29] The Senator was horrified by the procedure and inspired to work for its abolition.[30] Reid offered a "Sense-of-the-Senate" resolution condemning FGM that September, and introduced the bill banning the practice in the United States the following month.[31]

Representative Schroeder, now retired, worked on the prohibition of FGM for more than 20 years. She first introduced a bill to ban FGM in the United States in 1993.[32] In June of 1995, the

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[27] *See* N.Y. SOC. SERV. LAW § 413 (McKinney 1996) (mandating certain professionals, including doctors, nurses and school officials, to report any situations in which they have "reasonable cause to suspect" child abuse or neglect); N.Y. SOC. SERV. LAW § 420(1) (McKinney 1996) (providing that officials who fail to report suspected cases of child abuse may be guilty of a misdemeanor).

[28] *See* Dugger, *supra* note 25; *A Rite That's Wrong*, PLAIN DEALER, Jan. 4, 1997, at 10B.

[29] *Reid Press Release, supra* note 26.

[30] *Id.*

[31] *Id.* The legislation was co-sponsored by Senators Paul Wellstone (D-MN) and Carol Moseley-Braun (D-IL).

[32] H.R. 3247, The Federal Prohibition of Female Genital Mutilation Act of 1993, introduced Oct. 7, 1994.

House passed Schroeder's resolution urging the President to help abolish FGM internationally.[33] Both Schroeder and Reid attributed earlier failures to pass legislation to the fact that many members of Congress were not aware that the practice existed.[34]

A confluence of factors resulted contributed to the increased awareness of FGM on the part of the American public, and hence, to the timing of the legislation. The Hosken Report, an overview of FGM first published by Fran P. Hosken in 1978,[35] brought the first major attention to the issue in the West. It was Hosken who originated the term FGM. Hosken presented her work at a World Health Organization (WHO) conference in 1979, and her presentation resulted in a unanimous condemnation of FGM by WHO.[36] However, it was not until the early 1990s that more general public attention in the United States was drawn to this issue. One contributing factor may have been the increase of immigrants from countries which traditionally practice FC. There were approximately 15,000 immigrants to the United States between 1990 and 1993 from the Horn of Africa, mostly due to wars and famine in that region.[37] Another factor was the publication of the novel *Possessing the Secret of Joy* by Alice Walker.[38] Although the book was fictional, it told the

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[33] *Congressional Press Releases, House Passes Schroeder Resolution on Female Genital Mutilation*, June 7, 1995, *available in* LEXIS, News Library, Arcnws File. [hereinafter *Schroeder Press Release*].

[34] Celia W. Dugger, *New Law Bans Genital Cutting in United States*, N.Y. TIMES, Oct. 12, 1996, at A1.

[35] HOSKEN, *supra* note 4, at 1. *But see* Lane & Rubenstine, *supra* note 5, at 37 (commenting on the controversial nature of Hosken's work: "the way Hosken characterizes the cultures and the people who practice female circumcision, which she calls mutilation, is often seen as intolerant and insensitive by the very people she has sought to help. Thus, Hosken has been a catalyst for both awareness and polarization.").

[36] HOSKEN, *supra* note 4, at 1.

[37] TOUBIA, *supra* note 4, at 26.

[38] ALICE WALKER, POSSESSING THE SECRET OF JOY (1992). *But see* Micere Githae Mugo, Colloquium, *Bridging Society, Culture and Law: The Issue of Female Circumcision: Elitist Anti-Circumcision Discourse As Mutilating and Anti-Feminist*, 47 CASE W. RES. 461, 463 (1997) (criticizing Walker's "fictional depiction of the African world [as] condescending and touristic . . . informed by

story of a young African woman who underwent circumcision, and Walker's story brought a new wave of public attention to this issue, which evinced both sympathy and horror.[39] The efforts of several organizations, within the United States and throughout the world, such as Equality Now, Population Action International, and the Washington Metropolitan Alliance to End Ritualistic FGM, have also been integral to increased public knowledge of the issue and the passage of the law.[40]

In September, 1994, during the United Nations Conference on Population in Cairo, Egypt, CNN broadcast a videotape of a young Egyptian girl's circumcision.[41] The graphic video depicted the girl screaming in pain as her parents watched the procedure. The segment sparked worldwide outrage and condemnation of FGM as well as increased media coverage of the issue.[42] This broadcast also inspired Senator Reid to legislate for the abolition of FGM.[43]

In 1996, Fausiya Kasinga, a young woman who fled from Togo to the United States to avoid circumcision, was officially granted asylum after more than a year in a United States detention center.[44] Kasinga's case brought a great deal of attention to FGM from the press, the legal community, and the public at large.[45] Also in 1996, the Pulitzer Prize for photography was awarded to a young journalist for her photographs of an FC ritual in Kenya.[46] The photographs, which were published in Newhouse News Service newspapers, as

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colonial missionary conceptions . . . .").

[39] *See, e.g.*, William Raspberry, *Women and A Brutal "Tradition,"* WASH. POST, Nov. 8, 1993, at A21.

[40] *See generally* Burstyn, *supra* note 25; Jane Hansen & Deborah Scroggins, *Female Circumcision: U.S., Georgia Forced to Face Medical, Legal Issues*, ATLANTA J. & CONST., Nov. 15, 1992, at A1.

[41] Jill Smolowe, *A Rite of Passage or Mutilation?*, TIME, Sept. 26, 1994, at 65.

[42] *Id.*

[43] *Reid Press Release*, *supra* note 26.

[44] Celia Dugger, *U.S. Grants Asylum to Woman Fleeing Genital Mutilation Rite*, N.Y. TIMES, June 14, 1996, at A1.

[45] *Id.*

[46] Beth Reinhard, *22 Year Old Wins Pulitzer for Gripping Photographs*, PALM BEACH POST, Apr. 10, 1996, at 1A.

well as the attention that came with the Pulitzer Prize, educated an even wider audience of Americans about FGM.[47] The accumulation of this media attention, with the concomitant outrage it inspired in many Americans, created an atmosphere conducive to Congressional approval of the ban.

However, it is somewhat ironic that the FGM prohibition was enacted during the conservative 104th Congress, which emphasized the importance of religious freedom and limited government. For example, in its "Contract With America" the majority Republican party declared, "[b]igger government and more federal programs usurp personal responsibility from families and individuals. The GOP contract restores a proper balance between government and personal responsibility."[48] It was also during the 104th Congress that two prominent Republican Congressional leaders introduced the "Religious Equity Amendment," which would amend the United States Constitution to allow prayer in public schools and religious displays in government buildings and public spaces.[49] A political party concerned with "big government usurping personal responsibility," and proposing a Constitutional amendment to expand the protection of religious expression, seems at odds with banning a private family tradition that many practitioners believe is a religious requirement. Thus there is some speculation that the passage of the law had more to do with the desire of the Republican party to appeal to female voters than with real concern about the practice and effects

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[47] *See, e.g.*, 142 CONG. REC. S8972 (daily ed. July 26, 1996) (statement of Sen. Reid). Senator Reid referred to FGM as a "practice that is sweeping the country." *Id.*

[48] Nackey S. Loeb, *Out With the Old, In With the New: Contract With America*, THE UNION LEADER, Sept. 28, 1994, *available in* LEXIS, News Library, Arcnws File.

[49] H.R. Res. 121, 104th Cong., 1st Sess. (1995) (introduced by Rep. Henry Hyde); S.J. Res. 45 104th Cong., 1st Sess. (1995) (introduced by Sen. Orrin Hatch). *See also* Linda Feldman, *"Religious Equity" Goes Far Beyond Classroom Prayer*, CHRISTIAN SCI. MONITOR, June 12, 1995 at 1; David Sears, *Religious Equality Amendment Would Expand School Prayer*, (NPR radio broadcast, *All Things Considered*, July 10, 1995) (Trans # 1904–7, *available in* LEXIS, News Library).

of FGM.[50]

II. STATE LAWS

In addition to the federal law, eight states have laws specifically prohibiting the practice of FGM. California, Delaware, New York, North Dakota, and Wisconsin prohibit its practice on children.[51] Illinois, Minnesota and Tennessee ban the practice entirely, for adults as well as minors.[52] All of the state laws, except New York, were passed during the 1995–1996 legislative session. Most of the laws include provisions peremptorily discounting the belief that FGM is "required as a matter of custom or ritual," and preventing such justification from serving as legal excuse for the practice.[53]

The most comprehensive laws were enacted in Minnesota and California. These laws both contain legislative findings that FGM is occurring in the state or that there is population at risk in the state. These two states also provide education and outreach to at-risk communities, while the other states simply prohibit the practice.

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[50] Dugger, *supra* note 34.

[51] 1996 Cal. Adv. Legis. Serv. 790 (Deering) (effective Jan. 1, 1997); 1996 Del. Laws 438 (1996), amending 11 DEL. CODE 1113(a) (effective July 3, 1996); 1997 N.Y. Laws 618, adding § 130.85 to N.Y. PENAL LAW (signed by Gov. Pataki on Sept. 29, 1997); N.D. CENT. CODE § 12.1-36-01(effective Aug. 1, 1995); and 1995 WIS. LAWS § 365 (effective May 28, 1996).

[52] 1997 Ill. Laws 88 (effective July 11, 1997); MINN. STAT. ANN. § 609.2245 (West 1996); TENN. CODE ANN. § 39–13–110 (1997) (effective July 1, 1996); *Compare* the Minnesota statute, "whoever knowingly circumcises, excises or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another is guilty of a felony," *with* the Delaware law, 11 DEL. CODE 1113(a) (1996), "A person is guilty of female genital mutilation when: (1) a person knowingly circumcises, excises or infibulates the whole or any part of the labia majora, labia minora, or clitoris of a female minor," or the Wisconsin law, WIS. STAT. ANN. § 146.35(2) (West 1997) ("No person may circumcise, excise or infibulate the labia majora, labia minora or clitoris of a female minor.").

[53] WIS. STAT. ANN § 146.35(4)(b) (West 1997); DEL. CODE ANN. tit. 11, § 780 (1996); N.D. CENT. CODE, § 12.1–36–01(2) (effective Aug. 1, 1995); TENN. CODE ANN. § 39–13–110(a) (1997); MINN. STAT. ANN. § 609.2245 subd. 1 (West 1996); The California and Illinois laws do not include such a provision.

A. Minnesota

The Minnesota law requires the state's Commissioner of Health to provide for outreach and education concerning the potential physical and psychological complications resulting from FGM to communities in which it is traditionally practiced.[54] The outreach is also to be designed to inform immigrants and health care professionals that the practice is illegal and carries criminal penalties.[55] The law mandates that the Health Commissioner work with "culturally appropriate groups to obtain private funds" to use for such activities.[56]

This law was passed amidst concern that FC was being performed among Somali, Ethiopian, and Sudanese immigrant communities in Minnesota.[57] "The observations by physicians highly suggest that this procedure is going on now [in Minnesota]," reported Dr. Dorris Brooker, professor of Obstetrics and Gynecology at the University of Minnesota.[58]

However, the law provides no specific penalty for its violation.[59] FGM is included on the "Unranked Offense List," a set of crimes excluded from ranking because prosecutions are rarely, if ever, initiated under them.[60] As a result, if someone were to be convicted of such a felony, a judge would have to use his or her discretion in sentencing.[61] This is the only FGM law, state or federal, which acknowledges the scant likelihood of resulting prosecution.

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[54] MINN. STAT. ANN. § 144.387 (West 1996) ("The commissioner of health shall carry out appropriate education, prevention, and outreach activities in communities that traditionally practice female circumcision . . . to inform people in those communities about the health risks and emotional trauma inflicted by those practices.").

[55] MINN. STAT. ANN. § 609.2245 (West 1996).

[56] MINN. STAT. ANN. § 144.3872 (West 1996).

[57] *House Committee Approves A Proposal Making Female Circumcision Ritual A Felony*, STAR TRIB.,(Minneapolis, MN), Mar. 17, 1994, at 2B.

[58] *Id.*

[59] MINN. STAT. ANN. § 609.2245 (West 1996).

[60] MINN. SENT. GUIDE. II.A (1996).

[61] *Id.* at II.A.05.

The Minnesota statute, like the Illinois and Tennessee statutes, does not limit the prohibition on FGM to minors, but entirely bans the act.[62] The plain language of these laws, allows an individual to be prosecuted for excising an adult. A minor's consent to the procedure does not serve as an excuse from the law in any of these states,[63] and the question of whether consent by an adult for the operation on herself is prohibited is not addressed by any of the statutes.

B. California

The California law[64] provides for "[h]eightened awareness among child protective services workers, health care providers, educators, and law enforcement personnel" and for "criminal investigations and prosecutions . . . to send a strong message that California abhors this practice."[65] The activism of Meserek Ramsey, founder of Forward USA (an organization dedicated to abolishing FGM), was instrumental in the passage of the law.[66] Ms. Ramsey, an Ethiopian immigrant, reported that FC was occurring in California's immigrant communities[67] and led a persistent effort to educate legislators about the practice, its prevalence in the United States, and the need to legislate against it.[68]

California's law takes the clearest stance on whether FGM is a religious practice, providing that "[t]his 4,000 year old cultural practice is not a requirement of any major religion."[69] This

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[62] 1997 Ill. Laws 88; MINN. STAT. ANN. § 609.2245 (West 1996); TENN. CODE ANN. § 39–13–110 (1997).

[63] *Id.* § 39–13–110(a) ("Consent to the procedure by a minor on whom it is performed or by the minor's parent is not a defense to a violation of this section."); MINN. STAT. § 609.2245, subd. 1.

[64] 1996 Cal. Adv. Legis. Serv. 790 (Deering).

[65] *Id.* § 790(g).

[66] Max Vanzi, *Ethiopian Led Campaign To Ban Female Mutilations*, L.A. TIMES, Sept. 24, 1996, at A20.

[67] *Id.* (quoting Ramsey: "I have found [that FGM] goes on very much in San Diego, Los Angeles and Santa Rosa").

[68] *Id.*

[69] 1996 Cal. Adv. Legis. Serv. 790(e) (Deering).

pronouncement goes beyond any other state or federal law, which merely provide that tradition or ritual belief is not an excuse from the law. California takes this peremptory dismissal of religious freedom claims one step further by unequivocally stating that no religion requires FGM—a position with which not all Muslim religious leaders agree.[70]

C. New York

Unlike the other states which ban FGM, New York enacted its law after the federal prohibition was already in effect. The legislative sponsors of the bill reportedly "wanted to give state enforcement officials jurisdiction because of the large number of immigrants" residing in New York from countries that traditionally practice FGM.[71]

The New York law prohibits performing FGM on minors, and imposes criminal liability on both the circumcisor and the parent or guardian of the circumcised child.[72] FGM is a Class E felony, punishable by up to one year in prison.[73]

As in California and Minnesota, New York legislators exhibited concern that FGM was being performed in the State. New York Assemblywoman Barbara Clark, a sponsor of the ban, stated, "[i]t's [FGM] still a major, major issue for many people who live in New York State,"[74] Reflecting this concern, the New York law mandates

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[70] *See* Section IV *infra.*

[71] Lynn Brezosky, *New York Oks Ban on Genital Mutilation,* NEWSDAY, Aug. 8, 1997, at A27.

[72] N.Y. PENAL LAW § 130.85(1)(A)-(B) ("A person is guilty of Female Genital Mutilation when: (A) a person knowingly circumcises, excises, or infibulates . . . ; or; (B) Being a parent or guardian or other person legally responsible and charged with the care or custody of a child . . . or; he or she knowingly consents to the circumcision, excision, or infibulation . . . .''

[73] *Id. See also Girls' Genital Mutilation Is A Felony in New Law,* N.Y. TIMES, Sept. 30, 1997, at B4.

[74] *New York: Legislature Bans Female Genital Mutilation,* ABORTION REPORT, Aug. 4, 1997, *available in* LEXIS, News Library, Curnws file.

that the Department of Social Services and the Department of Health establish education and outreach activities to communities which may practice FGM.[75]

D. Delaware and Wisconsin

The laws in both Delaware and Wisconsin define FGM as "circumcis[ion], excis[ion], or infibulat[ion] [of] the whole or any part of the labia majora, labia minora, or clitoris of a female minor."[76] Both states criminalize FGM like child abuse, making it illegal to practice on minors, and holding both the parents and the person who performs it liable as a Class E felony, punishable by up to 5 years in prison.[77] Neither consent of the minor or the parent, nor the fact that it is "required as a matter of custom, ritual or standard practice," serve as an excuse from the Delaware law.[78]

Violation of the Wisconsin FGM law results in a fine of up to $10,000, imprisonment of up to five years, or both. Neither Delaware nor Wisconsin provide for outreach or education to communities likely to engage in the practice, nor include any finding that FGM may be occurring in the state.[79] This lack of education and outreach may signify that there is not a targeted community in either state, and that the law is more symbolic than actually intended to prevent the practice of FGM.

E. North Dakota

The North Dakota law is somewhat different in that it makes "any person who knowingly separates or surgically alters normal, healthy, functioning genital tissue of a female minor . . . guilty of a

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[75] N.Y. PENAL LAW § 130.85(3) (1997).
[76] 1996 DEL. ALS 438 (a)(1) (LEXIS 1996); 1995 Wis. Laws § 365(2).
[77] DEL. CODE ANN. tit. 11, § 780(a)-(b) (1996).
[78] *Id.* § 780(c).
[79] WIS. STAT. ANN. § 146.35 (West 1996).

class C felony."[80] It does not specifically name or define FGM and there is no liability for parents. But, as with Delaware and Wisconsin, there are also no efforts at outreach or education and no finding that FGM is being practiced in the state. The law does specify that "any belief that the operation is required as a mater of custom, ritual, or standard of practice may not be taken into consideration."[81]

F. Other Legislative Attempts

Several states, including Colorado, Louisiana, New Jersey, Pennsylvania and Rhode Island made legislative efforts to prohibit the practice in the 1995–96 (and first half of 1997) legislative sessions. All of these attempts were unsuccessful. Obstacles to passage in those states included skepticism about whether FGM was the type of problem that could be addressed legislatively, and whether it was even an actual problem in the state.[82] The following exchange, which occurred in Rhode Island, is an example of some legislators' attitude towards FGM laws.[83] Representative Charles Knowles, Chair of the Judiciary Committee, accused the bill's sponsor, Representative Ellen

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[80] N.D. CENT. CODE § 12.1–36–01(1) (1997). *See generally, Female Challenge To Male Circumcision Fails*, NAT'L L.J., June 23, 1997, at B15. Three North Dakota plaintiffs challenged the law, alleging that the law violated equal protection by not protecting boys from circumcision. The case was dismissed on June 3, 1997 by the Eighth Circuit Court of Appeals for lack of standing. *Id.*

[81] N.D. CENT CODE § 12.1–36–01(2) (1997).

[82] *See, e.g.*, Megan O'Matz, *Pennsylvania Bill Would Outlaw Female Circumcision*, THE MORNING CALL (Allentown), May 3, 1996, at A3:

> Officials in Pennsylvania know of no reported cases of female circumcision here. The state Board of Medicine has never received any complaints of a licensed or unlicensed physician performing the procedure. Likewise, the state Attorney General's office and the Pennsylvania District Attorneys Association have no reported incidents. Nonetheless, [state Representative Lita Indzel] Cohen believes the bill is necessary . . . .

Id.

[83] In Rhode Island, House Bill 7769 passed the Senate but died in the House Judiciary Committee.

Kellner, of "trivializ[ing] our process by submitting such a meaningless, pointless piece of legislation."[84] Representative Knowles further stated he did not believe the issue to be "worthy of legislative debate."[85] Representative Kellner submitted the bill because of her concern about Rhode Island's increasing immigrant population from Asian and African countries where FGM is traditionally practiced.[86] Kellner became involved in the anti-FGM effort after learning of Fausiya Kasinga's plight.[87]

Other bills criminalizing FGM stalled in the state legislatures of Colorado,[88] Nevada,[89] New Jersey,[90] Oregon,[91] and West Virginia.[92]

III. INTERNATIONAL LAWS

Many Western European countries have criminalized FGM. As

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[84] Scott MacKay, *Genital Mutilation Bill Spurs Harsh Words*, PROVIDENCE J. BULL., Apr. 12, 1996, at 3B.

[85] *Id.*

[86] *Id.*

[87] Thomas J. Morgan, *Hanson Raises Female Circumcision Issue in Bid for House*, PROVIDENCE J. BULL., May 21, 1996, at 3D.

[88] S. 31, 60th , Gen. Assembly, 2d Reg. Sess. (Colo. 1996). *See* John Sanko, *Proposal Prohibits Genital Mutilation*, ROCKY MTN. NEWS, Jan. 25, 1996, at 8A. The Colorado bill passed unanimously in the Senate Judiciary Committee but several Senators raised questions concerning the necessity and constitutionality of the law. For example, Senator Ed Perlmutter questioned whether the law violated the First Amendment. *See also Under the Dome*, DENVER POST, May 8, 1996, at B5. The bill eventually passed in the full Senate but stalled in a House Committee and was withdrawn in May 1996.

[89] Senate Bill 192 passed the Assembly Health and Human Services Committee. *See* Dee-Ann Durbin, *Genital Mutilation Bill Passed By Committee*, LAS VEGAS REV. J., May 27, 1997, at 2B.

[90] S. 1865, 207th Leg. (N.J. 1997).

[91] H. 3334, 69th Leg. (Or. 1997).

[92] S. 73, 73rd Leg., (W. Va. 1997). Additionally, the Louisiana State Senate passed a bill, La. H.C.R. 52, Reg. Sess. (1996), requesting that the President and Congress use United States influence abroad to end "uncontested" FGM. The bill included a provision granting asylum to victims of FGM abroad, but did not address the domestic practice of FGM.

in the United States, the passage of most of these laws was spurred by a combination of outrage over the practice occurring in other parts of the world, and apprehension that it would be continued among immigrant groups in their new home states.

A. Great Britain

In Great Britain, female circumcision is believed to be practiced by immigrants from Somalia, Eritria, Ethiopia, and Yemen.[93] The Prohibition of Female Circumcision Act of 1985 made it illegal for anyone to "excise, infibulate or otherwise mutilate" or "to aid, abet, or procure the performance by another person of any of these acts."[94] Persons found guilty of violating the law are liable for a fine and up to five years in prison.[95] The campaign to pass the law was prompted by a BBC documentary which depicted British surgeons performing the "operations" on immigrant children.[96] In 1990, the law was amended to require social workers and teachers to report suspected cases of FC.[97] The law also prohibits parents from taking children out of the country to have circumcision performed abroad. In severe cases, courts may remove a child from home for her protection.[98] Unlike the United States law, FC is prohibited for adults as well as minors.

However, despite its comprehensive ban, there have been no criminal prosecutions under the law.[99] The first legal action concerning FC was taken in November, 1993. Dr. Farouk Hayder Siddique, who "agreed to perform" a circumcision on an adult

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[93] J.A. Black & G.D. Debelle, *Female genital mutilation in Britain*, 310 BMJ 1590, 1591 (1995).

[94] *Id.*

[95] *Id.*

[96] Hansen & Scroggins, *supra* note 40; *See also* Daniela Iacono, *Female Circumcision: A Shocking Practice in Swank London Clinics*, U.P.I., Feb. 17, 1985, *available in* LEXIS, News Library, Arcnws File.

[97] Hansen & Scroggins, *supra* note 40.

[98] *See* TOUBIA, *supra* note 4, at 46.

[99] Black & DeBelle, *supra* note 92, at 1592.

woman, was found guilty of "serious professional misconduct" by the General Medical Council and his license was revoked.[100] Dr. Siddique did not actually perform the operation and therefore was not charged under the Prohibition of Female Circumcision Act.[101] While the British law was prompted by concerns of FC being performed on minors, the only enforcement action concerned the circumcision of an allegedly consenting adult.

The British law is not without its detractors. In February, 1993, Poline Nyaga, a member of London's Brent Council, who was born in Kenya, called for the decriminalization of FC. "Circumcision should be allowed as a right to all British women, particularly for African families who want to carry on the tradition while in this country."[102] However, according to Efua Doukenoo of Forward, a group working to abolish FGM, many African women in Great Britain were outraged by Nyaga's remarks.[103] Doukenoo also reported that despite the British law, "thousands of girls" undergo circumcision every year in Great Britain.[104]

B. France

France has a large immigrant community from Mali, Senegal, Gambia, and Mauritania, countries which traditionally practice female

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[100] Louise Jury, *Female Circumcision Surgeon is Struck Off*, THE GUARDIAN, Nov. 26, 1993, at 8.

[101] *See* Donu Kogbara et al., *Harley Street Surgeon Agreed To Perform Female Circumcision*, SUNDAY TIMES (London), Oct. 18, 1992, *available in* LEXIS, News Library, Arcnws File. Dr. Siddique was targeted as part of an investigation by the Sunday Times of London, in which journalist Donu Kogbara made arrangements with Dr. Siddique to perform the operation. Dr. Siddique allegedly acknowledged the operation was illegal but agreed to perform it anyway. The operation was interrupted just before the "patient," Ms. Kogbara, was anaesthetized. *Id.*

[102] Helen Pitt, *A Knife in Any Language*, THE GUARDIAN, Mar. 3, 1993, at 9.

[103] *Id.*

[104] Mariam Isa, *London Clinic Fights Myth and Practice of Female Circumcision*, REUTERS WORLD SERV., Mar. 21, 1995, *available in* LEXIS, News Library, Reuwld File.

circumcision.[105] Unlike the United States and Great Britain, France has no specific law against FC, but Article 312 of the Penal Code bars the practice by prohibiting the commission of "grievous bodily harm to a minor under 15."[106] Despite the absence of a specific law banning the practice, France is the only country in the world which has repeatedly prosecuted parents for circumcising female children.[107]

In France, there have been at least seven trials, involving 18 families,[108] and both parents and excisors have received suspended jail sentences.[109] In 1993, a Gambian woman, Teneng Jahate, was sentenced to five years in jail (four of them suspended) for "causing the wounding and mutilation of minors"–her two daughters.[110] Ms. Jahate was the first parent to serve jail time in France for submitting a child to female circumcision.[111]

As in all Western countries which have legally addressed FC, cultural imperialism has surfaced as a concern in France.[112] But

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[105] Andrew Gumbel, *"Female Circumcision" Woman Freed Amid Outcry*, THE GUARDIAN, Sept. 17, 1994, at 16.

[106] Colette Gallard, *Female [G]enital [M]utilation in France*, 310 BMJ 1592 (1995).

[107] Rone Tempest, *Ancient Traditions vs. The Law*, L.A. TIMES, Feb. 18, 1993, at A1.

[108] Marlise Simons, *France Jails Woman for Daughters' Circumcisions*, N.Y. TIMES, Jan. 11, 1993, at A8.

[109] *Id.*

[110] *Id.* Jahate "told the court that she did not know the practice was banned and that she was acting according to her religious beliefs." *Id.*

[111] *See* Pitt, *supra* note 102.

[112] *See, e.g.*, Julie Flint, *The First Cut*, THE GUARDIAN, Apr. 25, 1994, at 10, (discussing African women in Britain concerned with cultural bias in the movement to end FGM); *New Zealand Accused of "Sexploitation" Over Mutilation Ban*, AGENCE FRANCE PRESSE, Dec. 1, 1994 (an Australian Member of Parliament expresses concern that the Australian FGM law may be perceived by African immigrants as an "attack against a very sensitive cultural practice."); Gumbel, *supra* note 105 ("doctors often fail to report excisions they discover during routine examinations for fear of appearing hostile to foreign cultures."); Dugger, *Tug of Taboos, supra* note 25 (in which some African immigrants to the United States express concern that the new law is "specifically directed at Africans."); Constance Hilliard, *Condemning the Barbaric Practices of Others and Ignoring Our Own*, CHI. TRIB., Aug. 10, 1997, at 8 (questioning "whether the righteous indignation we

French authorities have not relaxed their stand against FC in response to these claims. Kofi Yamgnane, a Minister of State for social and racial integration, said "[p]eople have to understand that if they are going to live in a country . . . they must respect the rules of that country. . . . '[L]iberty' in France . . . means you don't mutilate people. You don't have that right."[113] However, the large number of suspended sentences given to parents found in violation of the law may be an indication of the court's reluctance to impose the full measure of the law against immigrants who do not believe they have done anything wrong.[114]

In an attempt to inform immigrants that the practice is illegal, health officials placed posters in immigrant communities warning that anyone practicing "female sexual mutilation in France is liable to imprisonment."[115] Immigrants received illustrated materials about French family law, including notice that FGM is illegal and what consequences they may face for violating the law.[116] Doctors and social workers are required to report children "at-risk or who have suffered female genital mutilation through the normal channels for cases of child abuse."[117] The absence of a specific FGM law in France implies that the practice is legal for adult women. All of the prosecutions in France have been cases of FGM performed on children, rather than adults.[118]

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feminists articulate to third world FGM practices may represent an elaborate form of emotional escapism from our own seemingly intractable problems").

[113] Tempest, *supra* note 107.

[114] Gumbel, *supra* note 105.

[115] *Id.*

[116] *See* Gallard, *supra* note 106.

[117] *Id.*

[118] For further discussion of the French anti-FGM efforts, see HOSKEN, *supra* note 4, at 299–302.

C. Other Western Countries[119]

Sweden's law, the oldest in Europe, was passed in 1982. Unlike the United States law, it provides for the prosecution of parents who send their children abroad to be circumcised.[120] Similar to British law, FC is illegal for adults as well as children.[121] FC is also illegal in Switzerland,[122] and was banned in Australia in 1994.[123] There have been persistent rumors of FC occurring among Italy's large Somali community, but there are currently no laws prohibiting the practice in that country.[124]

In the early 1990s, the Dutch Justice Minister and the Undersecretary for Health commissioned two experts—a female doctor and an obstetric nurse—to report on the practice of female circumcision among Somali immigrants to the Netherlands.[125] The government concluded that "mutilating circumcision" must be banned by law, but the Sunna form—incision without removal of tissue—would be allowed for reasons of religious and cultural tolerance.[126] Dutch authorities believed this measure would lead gradually to a ban on all forms of the practice.[127]

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[119] For an account of responses to FGM occurring in immigrant groups in non-Western countries, see generally *FGM—Living in Ignorance*, MAINICHI DAILY NEWS, (Nishikyo-ku, Kyoto), Jan. 7, 1997, at 9 (describing the concern that FGM is occurring in immigrant communities in Japan). *See also* Jacqueline Thorpe, *Ontario Doctors Ban Female Circumcision*, REUTER LIBR. REP., Jan. 27, 1992, *available in* the LEXIS, News Library, Arcnws File. The College of Physicians and Surgeons of Ontario have banned FC. Doctors reportedly found immigrant women from Ethiopia, Somalia and Kenya, who have settled in Ontario at risk of the procedure. However there is currently no law specifically prohibiting FGM in Canada. *Id.*

[120] *See* Isa, *supra* note 104.

[121] *See* HOSKEN, *supra* note 4, at 298.

[122] *See* Tempest, *supra* note 107.

[123] *New Zealand Government Accused of "Sexploitation," supra* note 112.

[124] *See* HOSKEN, *supra* note 4, at 303.

[125] *See* Henrietta Boas, *Problem of Female Circumcision in Holland*, JERUSALEM POST, May 10, 1992.

[126] *Id.*

[127] *Id.*

IV. CONSTITUTIONALITY OF A CRIMINAL BAN ON FGM

Cultural relativism notwithstanding, the United States law faces the more traditional obstacle of constitutional constraint. There are two potential constitutional problems with the federal law. The first is whether the law burdens an individual's free exercise of religion.[128] The second potential problem is whether the law is beyond the scope of the federal government's regulatory power.[129] To resolve the first issue, the question of whether FC is indeed a religious practice must be explored.

A. Religion and Female Circumcision

> "Religion and culture are not distinct for many . . . ancient peoples. A ritual like this has a strong spiritual and religious aura about it."[130]

> "Mutilation is not required by any religion."[131]

FC is most prevalent among Muslims, but it is also performed by some Christians and by the adherents of some traditional African religions.[132] Christian practitioners include various churches unaffiliated with Western sects[133] and Coptic Christians, a group based primarily in Egypt, Sudan and Ethiopia.[134] Additionally, the Ethiopian Orthodox church has traditionally considered un-

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[128] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend I.

[129] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X.

[130] Dr. Issac, *quoted in* Hansen & Scroggins, *supra* note 40.

[131] 142 CONG. REC. S897 (daily ed. July 26, 1996).

[132] TOUBIA, *supra* note 4, at 31.

[133] *Id.* at 32.

[134] *Id.*

circumcised women to be "unclean."[135]

Different forms of female circumcision have also been practiced in the West. As recently as 1950, women were circumcised for "medical" reasons in the United States and Western Europe.[136] Clitorectomies were performed in the West under the guise of a "cure-all" for many women's problems, including epilepsy, lesbianism, kleptomania, nymphomania, melancholia, and masturbation.[137]

Whether a practice is a religious requirement is difficult to objectively answer. The link between FGM and religion most often arises in the context of Islam, the religion of the majority of FGM's practitioners. The traditional cultures of many Islamic societies which practice FGM blur the distinction between religious requirement and cultural, but not religious, tradition. According to Hosken, FGM predated the Islamic religion in Africa, but was "accepted and propagated by Islam."[138]

FC is not mentioned in the Koran or the Hadith (a collection of sayings of the Prophet Mohammed).[139] The only mention of FC is made in the *Ahadith*, an "unsubstantiated" collection of Mohammed's sayings, considered by Muslims to be a less reliable authority.[140] Furthermore, FC is not practiced in many Islamic societies, including Saudi Arabia, Iran, Kuwait, and Pakistan.[141] Most Islamic scholars say that FC is not required by Islam,[142] but local religious leaders, who

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[135] *Id.*

[136] Karin Davies, *Female Circumcision Viewed With Reverence, Revulsion*, SUNDAY GAZETTE MAIL, July 7, 1996, at 14A.

[137] *See* Ben Barker-Benfield, *Sexual Surgery in Late-Nineteenth-Century America*, 5 INT'L J. HEALTH SERVS. 279 (1975). *See also* HANNY LIGHTFOOT-KLEIN, PRISONERS OF RITUAL 179–81 (1989).

[138] HOSKEN *supra* note 4, at 71.

[139] Lane & Rubinstine, *supra* note 4, at 34.

[140] TOUBIA, *supra* note 4, at 31.

[141] LIGHTFOOT-KLEIN, *supra* note 137, at 41.

[142] *See* ALICE WALKER & PRATIBHA PARMAR, WARRIOR MARKS 325 (1993). Walker and Parmar interviewed Islamic scholar Baba Lee, who pointed out that "[FGM is] a tradition that has been practiced long before Islam came to this continent [Africa]. It has nothing to do with Islam. It is not mentioned in the Holy

tend to have more influence on whether the practice is actually continued, are often not as clear or consistent on the issue. According to Hosken, "the Moslem religious leaders teach that FC is a requirement of Islam, though religious scholars always deny this . . . ."[143]

The name given to one form of FC is "Sunna," a term which means "to follow the tradition of the Prophet."[144] The "use of the term . . . implies the custom is religiously ordained. Similarly . . . in colloquial Arabic [FC] is popularly called 'tahata,' referring to the ritual state of purity that is required for Islamic prayer."[145] The confusion about whether FC is required by Holy Law is widespread. For example, in Egypt, Al-Azhar University is one of the most powerful and influential authorities on religious law for Sunni Muslims. With a change in leadership in 1996, the University reversed its position on FC. The late Sheik Gad al Haq Ali Gad al-Haq, head of the Institute until his death on March 16, 1996, had issued a *fatwa* (a religious edict) supporting FC. According to the *fatwa*, circumcision "is a duty for men and women and if the citizens of a country refrain from practicing it, the imam should challenge them as if they were ignoring the call to prayer."[146]

However, Gad Al-Haq's more moderate successor, Sheik Mohammed Sayed Tantawi, has said that FC is not required by law and should be done at a doctor's discretion.[147] Yet Sheik Tantawi also

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Koran." *Id. See also Islam in Perspective, Female Circumcision*, MONEYCLIPS, Mar. 4, 1994, *available in* LEXIS, News Library, Moclip File.

[143] HOSKEN, *supra* note 4, at 186

[144] Lane et al., *supra* note 4, at 34.

[145] *Id.*

[146] *Top Moslem Authority Defends Call for Female Circumcision,* AGENCE FRANCE PRESSE, Sept. 16, 1995. The *fatwa* resulted in a lawsuit against the sheik by the Egyptian Organization for Human Rights, which sued Gad Al-Haq for $150,000 as "compensation for the moral damage" caused by his decree. *Id. See also Court Rejects Group Lawsuit on Female Circumcision*, AGENCE FRANCE PRESSE, Oct. 13, 1996. The suit was dismissed in October, 1996 when the court ruled that the human rights group had no interest at stake. *Id.*

[147] *Partial Circumcision Can Be "Useful" For Girls*, AGENCE FRANCE PRESSE, Apr. 9, 1996.

stated that 'moderate circumcision' "is a cleanliness useful for both women and men."[148] With disagreement among the highest religious authorities within the most preeminent Islamic University, it is not surprising that there is confusion at the level of local religious leaders and Muslims themselves. For example, in Southeast Asia, Hosken reports that FC is "performed as a religious Moslem rite."[149] In Malaysia, it "is highly recommended by Islam for a female child."[150] In the many different regions where FC is practiced, the line between religious law and cultural tradition is not always clear.

Many Western writers have resolved this issue by concluding that since FC is not in the Koran, it is not a religious act.[151] This conclusion ignores the realities of the daily practitioner who may not be aware of the academic controversy over the issue, or the periodic change in the official opinions of religious leaders. For many people, especially those in rural areas, the local religious leader's word is authoritative, and tradition demands the practice's continuation.[152]

In a compilation of four independent studies done in Sudan, Sierra Leone, and Somalia, the justification consistently given by women for continuing FC was that the practice was a religious

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[148] *Id.*

[149] HOSKEN *supra* note 4, at 279.

[150] *Id.* at 285 (quoting Dr. Roziah Omar, a medical anthropologist).

[151] *See Note, supra* note 5, at 1952, (the belief that FGM is a religious requirement is based upon "insufficient doctrinal foundation."); Catherine L. Annas, *Irreversible Error: The Power and Prejudice of Female Genital Mutilation*, 12 J. CONTEMP H.L. & POL'Y 328, 325, ("No established religion in the world requires or even suggests, that this procedure should be inflicted upon women.").

[152] *See generally,* Melvin Dzisah, *Cote D'Ivoire Women*, INTER PRESS SERVICE, March 22, 1995, (quoting teacher Kame Skendou: "It is our tradition, and we are making sure it does not die away with time."); Sarah Gauch, *In Egypt, Movement to Ban Ancient Practice Expands,* CHRISTIAN SCI. MONITOR, Dec. 19, 1996, at 7. Gauche quotes Dr. Mounir Fawzi: "The practice is good for women and it is ordained by Islam." Dr. Fawzi is an Islamic fundamentalist doctor suing the Egyptian Minister of Health for the instatement of a ban prohibiting FGM in Egyptian state hospitals. One can imagine arguments based on the "doctrinal sufficiency" of a practitioner's beliefs would not be an effective method to end FGM.

requirement.[153] A study of practitioners in Nigeria found religion, along with tradition, fertility, chastity and aesthetics to be the primary reasons given for the practice.[154] The United Nations Working Group on Traditional Practices Affecting the Health of Women and Children found the main reasons for the practice were tradition, religion, and controlling women's sexuality.[155]

In considering a free exercise challenge to the United States law, however, an adherent's sincere belief that an act is required by her religion is usually more important than doctrinal unanimity on the issue.

B. U.S. Courts and Free Exercise Jurisprudence

> "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[156]

> "[I]n order to realize the goals of religious liberty, 'religion' must be defined broadly enough to recognize the increasing number and diversity of faiths. Furthermore, 'religion' must be defined from the believer's perspective."[157]

The first step in deciding whether a law is an unconstitutional burden on an individual's religion is determining whether there is indeed a religious belief that is burdened.[158] In *United States v.*

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[153] Loretta M. Kopelman, *Female Circumcision and Ethical Relativism*, 20 SECOND OPINION 54, 60 (1994).

[154] *Note*, *supra* note 5, at 1949.

[155] Slack, *supra* note 1, at 448, (paraphrasing the Draft Report of the Working Group on Traditional Practices Affecting the Health of Women and Children, U.N. Doc.E/CN.4/HC.42/1985/L.5, Introduction, Sept. 12, 1985).

[156] United States v. Ballard, 322 U.S. 78, 86 (1944).

[157] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §14.6, at 1181 (2d ed. 1988).

[158] *Id.* §14.14 at 1282.

Ballard,[159] the Supreme Court found it permissible to inquire into the sincerity of a person's religious beliefs, but not the accuracy or truthfulness of those beliefs.[160] In *Thomas v. Review Board* [161] the Court held that "[t]he determination of what is a religious belief or practice is more often than not a difficult and delicate task . . . religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit first amendment protection."[162] The Court further remarked that courts should not attempt to dissect religious beliefs simply because they are not "articulated with the clarity and precision that a more sophisticated person might employ."[163] More recently, in *Frazee v. Illinois*,[164] the Court determined that sincere religious belief does not need to be tied to a particular sect to merit free exercise protection.[165] As Constitutional scholar Laurence Tribe noted, "the proper place for [the Court's] inquiry is in the assessment of the believer's sincerity, not in any evaluation of the belief's externalities."[166]

Therefore if an immigrant believes FGM is a religious requirement, even though the head of Al-Azhar University disagrees, her belief may still be a valid religious dictate in the eyes of the Court. The academic question of whether FGM is required by religion, dictated by tradition, or propagated by a misogynist culture may not be critical in determining whether it is a sincerely held religious belief before a United States court.

The second step in free exercise jurisprudence is to determine whether the law in question actually burdens the free exercise of

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[159] 322 U.S. 78 (1944).
[160] *Id.* at 81.
[161] 450 U.S. 707 (1981).
[162] *Id.* at 714.
[163] *Id.* at 715.
[164] 489 U.S. 829 (1989).
[165] *Id.* at 834. The Court "reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.*
[166] TRIBE, *supra* note 157, § 14.6, at 1182.

religion.[167] Historically parallel to FGM laws are the anti-Mormon laws of the late 19th century. The Anti-Bigamy Act was directly aimed at a particular religious group, criminalizing a practice it believed was religiously ordained, but which most other Americans found "revolting." In *Reynolds v.* United States[168] the Court found that the Anti-Bigamy Act was not an unconstitutional burden on Mormon's Free Exercise rights.[169] Moreover, the Court stated in dicta that, "[p]olygamy has always been odious among the northern and western nations of Europe, and until the establishment of the Mormon church was almost exclusively a feature of the life of Asiatic and African people."[170] The opinion also included the historical observation that in England and the American colonies, polygamy had been punishable by death.[171]

Reynolds represents the origin of the belief/action distinction that continues today.[172] "Laws are made for the government of actions, and while they cannot interfere with religious beliefs and opinions, they may with practices."[173] An individual's religious beliefs cannot be burdened by law. She cannot be compelled to believe or compelled to renounce her beliefs. However, an individual's right to *act* on her beliefs is not absolute.[174] This distinction was modified in *Cantwell v. Connecticut*,[175] which overturned the conviction of several Jehovah's Witnesses charged with inducing a breach of the peace and held that the Free Exercise

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[167] *Id.* § 14.12, at 1242.
[168] 98 U.S. 145 (1878).
[169] *Id.* at 166.
[170] *Id.* at 164.
[171] *Id.* at 165.
[172] *Id.* at 164. The Court found that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.*
[173] *Id.* at 166.
[174] *See id.* at 164; *see also* MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 204 (1996).
[175] 310 U.S. 296 (1940).

Clause provides protection for some religiously motivated action.[176]

Despite *Cantwell*, the fact remains that religious-based action may be burdened, as long as the burden is narrowly tailored to meet a state's compelling interest.[177] A law is considered burdensome by this "compelling interest" test if either its purpose or its effect infringes on religion.[178] This test was used until *Employment Division, Department of Human Resources v. Smith*,[179] when the Court turned away from the compelling interest test and held that "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[180] The opinion in *Smith* limited the compelling interest test to cases in which a person was denied unemployment compensation due to action he or she claimed was based on his or her

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[176] *Id.* at 303–4. The court reasoned that

> the [First] Amendment embraces 2 concepts,–freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Id. See also ARIENS & DESTRO, *supra* note 174, at 204–05.

[177] *See* Carl H. Esbeck, *A Restatement on the Supreme Court's Law of Religious Freedom: Coherence, Conflict or Chaos*?, 70 NOTRE DAME L. REV. 581, 599 (1995). Esbeck writes: "Even in the face of purposeful discrimination, government may proceed to enforce a restriction upon proof that it furthers a compelling state interest that cannot be achieved by means less restrictive to the religious practice." *See also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993). The court in that case held that "[t]o satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *See also* TRIBE, *supra* note 158, § 14.12, at 1252-53.

[178] This test was first articulated in Sherbert v. Verner, 374 U.S. 398 (1963).

[179] 494 U.S. 872 (1990).

[180] *Id.* at 877.

free exercise of religion.[181]

A tremendous outcry followed *Smith* from a diverse set of organizations concerned that the decision severely limited religious liberty.[182] Legal scholars, members of Congress, and leaders of religious denominations as diverse as the Southern Baptist Convention and the American Muslim Council, as well as groups spanning the ideological spectrum, from Concerned Women for America to the American Civil Liberties Union, expressed concern that the decision would severely limit the free exercise of religion.[183] Over one hundred legal scholars petitioned the court to rehear *Smith*, but the petitions were denied.[184] In response, Congress enacted the Religious Freedom Restoration Act (RFRA),[185] which reinstated the use of the compelling interest test set forth in the 1963 case, *Sherbert v. Verner*. However, the standard for religious based action seems to have returned to the pre-RFRA *Smith* test, with *City of Boerne v. Flores*,[186] in which the Court held that RFRA exceeded Congress' legislative power.

According to the reasoning set forth in *Ballard, Thomas* and *Frazee*, FGM can be viewed as a religious belief under either the RFRA or *Smith* standard.[187] The federal law is clearly a burden on the free exercise of this religious belief, since it directly prohibits a claimed religious practice.[188] However, courts may not find it to be an

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[181] *Id.* at 882. The court found that it had "never invalidated any governmental action on the basis of the Sherbert Test except the denial of unemployment compensation." *Id.*

[182] ARIENS & DESTRO, *supra* note 174, at 253–54.

[183] *See* Keith Jaasma, *The Religious Freedom Restoration Act: Responding to Smith; Reconsidering Reynolds*, 16 WHITTIER L. REV. 211, 225 & n.94 (1995).

[184] *Id.* at 218.

[185] 42 U.S.C. §§ 2000bb–2000bb–4 (Supp. V. 1993).

[186] 117 S. Ct. 2157 (1997); *See also* Linda Greenhouse, *Laws Are Urged To Protect Religion*, N.Y. TIMES, July 15, 1997, at A15 (account of potential legislative response to the RFRA decision).

[187] *See supra* text accompanying notes 159-65.

[188] *See, e.g., Hialeah*, 508 U.S. at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious

unconstitutional burden because the state has a compelling interest in not circumcising, or preventing the mutilation of, girls. Such an interest outweighs the adherent's right to this religious-based action. As with late 19th century Mormons and polygamy, the right to believe that FGM is required by religion is constitutionally guaranteed, but the right to carry out that belief may not be. The Supreme Court has never held that an act of Congress was unconstitutional on free exercise grounds,[189] and it is extremely unlikely to do so for the practice of FGM.

Moreover, the Supreme Court has been reluctant to allow any aberrant treatment of children in the name of their parent's religion. States can protect children from physical harm at the hands of their religiously motivated parents or guardians.[190] For example, in *Prince v. Massachusetts*,[191] a Jehovah's Witness could not exempt herself from Massachusetts child labor laws to allow her nine year old ward to distribute religious materials. The Court held that

> [n]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as parens patriae may restrict the parent's control . . . . Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct in religion or conscience.[192]

In *Jehovah's Witness v. Kings County Hospital*,[193] a court held the free exercise of Jehovah Witness parents was not violated by the state taking temporary custody of their child to authorize blood transfusions.[194] The District Court reaffirmed the principle of *Prince*

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reasons.").

189 ARIENS & DESTRO, *supra* note 174, at 253.

190 TRIBE, *supra* note 157, § 14.13, at 1267.

191 321 U.S. 158 (1944).

192 *Id.* at 166–67.

193 278 F. Supp. 488 (S.D.N.Y. 1967).

194 *Id.* at 505.

that "[t]he right to practice religion freely does not include the liberty to expose the child to ill health or death."[195]

As noted in Section I, the federal FGM law does not prohibit adults from freely choosing FC for themselves. However, three state laws, Illinois, Minnesota and Tennessee, do prohibit such a choice.[196] The application of these laws to adults may not meet constitutional muster. According to Tribe, "[w]here the *only* immediately affected person is the one whose religious scruples the state seeks to override, free exercise principles point to a wide berth for religious freedom."[197] In *Prince*, the court noted "the mere fact a state could not prohibit this form of adult activity . . . does not mean it cannot do so for children. . . . The state's authority over children's activities is broader than over life actions of adults."[198] A free exercise challenge to the Illinois, Minnesota or Tennessee law, brought by an adult who wished to have the procedure performed on herself, may convince a court to overturn the section of the law prohibiting the practice for adults.

An adult could challenge the law on the grounds that it is overbroad—meaning that the statute criminalizes more activities than it is actually intended to prevent.[199] This challenge would be similar to that levied against the city ordinances prohibiting animal cruelty which the Court found unconstitutional in *Church of the Lukumi Babalu Aye Inc. v City of Hialeah.*[200] In *Hialeah*, several of the city ordinances were held unconstitutional because "the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs."[201] The ordinances were overbroad because they "proscribed more religious conduct than [was] necessary to achieve their stated ends."[202] The Court declared

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[195] *Id.* at 504 (quoting *Prince*, 321 U.S. at 166).
[196] *See infra* Section II.
[197] TRIBE, *supra* note 157, § 14.13, at 1268.
[198] *Prince*, 321 U.S. at 167.
[199] *See* TRIBE, *supra* note 157, § 12.27, at 1022–24.
[200] 508 U.S. 520 (1993).
[201] *Id.* at 524.
[202] *Id.* at 538.

"[t]he legitimate government interest in protecting public health . . . could be addressed by restrictions stopping far short of a flat prohibition."[203] Similarly, in examining FGM laws, a court may find that the government interest in protecting girls' health can be met without restricting the right of adult women to undergo consensual circumcision.

Courts tend, however, to be more wary of religious action concerning non-Judeo-Christian based religions or religions that seem "odd" by what the Court considers to be traditional standards.[204] The best illustrations of this tendency can be seen in cases like *Smith* and *Lyng v. Northwest Indian Cemetery Protective Association*,[205] both of which involve Native-American religions. In *Lyng*, the Supreme Court overturned the lower courts' decisions, concluding that allowing the Forest Service to pave through an area sacred to Native Americans was not a violation of their free exercise rights.[206] The court noted, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[207] However, the dissent, seeming to perceive a bias to "non-traditional" religion, remarked that the decision, "represents yet another stress point in the long standing conflict between two disparate cultures—the dominant Western culture . . . and that of Native Americans."[208]

Smith concerned a law of general applicability which criminalized use of peyote.[209] The respondents in *Smith* were adherents of the Native American Church, and ingested peyote at a

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[203] *Id.*

[204] *See, e.g.*, State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976). In *Swann*, the Supreme Court of Tennessee held that a law prohibiting religious snake handling did not violate the free exercise clause. *See also* ARIENS & DESTRO, *supra* note 174, at 843. The Supreme Court has twice refused to hear appeals challenging the snake handling laws.

[205] 485 U.S. 439 (1988).

[206] *Id.* at 441.

[207] *Id.*

[208] *Id.* at 1070.

[209] *Smith*, 494 U.S. at 874.

sacramental ceremony.[210] Like the FGM law, the Oregon drug law contained no exemption for an action based on religious belief. The *Smith* Court stated, "[r]espondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious conviction, not only the convictions but the conduct itself must be free from government regulation. We have never held that and decline to do so now."[211] If the prohibition of FGM for adults by state law is not seen as a burden, it will most likely be due to the image of FGM as "odious and exclusively a feature of the life of Asiatic and African people."[212]

C. The Commerce Clause and the Federal Law

> "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."[213]

The second potential problem the federal law faces on Constitutional grounds is that it may exceed Congressional power as an area of regulation. The Tenth Amendment to the United States Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states are reserved to the states respectively, or to the people."[214] Article One, Section Eight of the Constitution grants Congress the power, *inter alia*, to levy taxes, establish post offices and roads, and regulate interstate commerce. The Commerce Clause is "the chief source of

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[210] *Id.*

[211] *Id.*

[212] *Reynolds*, 98 U.S. at 164 (language used by the Court to describe polygamy).

[213] United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy J., concurring).

[214] U.S. CONST. amend X.

congressional regulatory power,"[215] however, Congress' authority to legislate under the Commerce Clause is limited.[216] A law will not pass Constitutional muster "unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full."[217]

Whether a federal law prohibiting FGM would meet the requirements of the Commerce Clause will be determined by asking[218] "if there is any *rational basis* upon which Congress could have found *some relation* between its regulation and interstate commerce."[219] One commentator has argued that the ban on FGM is an attempt to control interstate commerce because "[w]ithout uniform federal legislation prohibiting FGM," people would "travel from state to state to procure the surgery."[220] The federal law, then, is necessary "to prohibit such movement of families and children in interstate commerce."[221]

However, the Supreme Court's 1995 decision in *United States v. Lopez* severely limited the federal government's regulatory powers under the Commerce Clause.[222] In *Lopez*, the Court declared that the federal Gun Free School Zones Act of 1990, a criminal statute which made possession of a gun in a school zone a federal offense,[223] "exceed[ed] the authority of Congress 'to regulate Commerce . . . among the several states.'"[224] The Court held the Gun Free School law was a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one

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[215] TRIBE, *supra* note 157, § 5.4, at 306.
[216] *Id.* at 316.
[217] *Id.*
[218] Karen Hughes, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL'Y 321, 337 (1995).
[219] *Id.* at note 88.
[220] *Id.* at 337.
[221] *Id.* at 338-42 (concluding that Congress could regulate FGM under each of the three traditional theories the Court has used in deciding Commerce Clause legislation).
[222] 514 U.S. 549 (1995).
[223] *Id.* at 551.
[224] *Id.*

might define those terms."[225] Since the Act "neither regulate[ed] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce,"[226] the Court found it beyond Congress' authority to regulate. The *Lopez* Court limited the outer reaches of Congressional Commerce Clause regulatory power, holding that granting Congress authority to criminalize guns in school zones would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[227] The Court made it clear that this was an expansion [it] "decline[d] . . . to proceed any further."

Similar to the Gun Free School law, the FGM law "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question" or act of FGM in the instant analysis has the "requisite nexus with interstate commerce."[228] The FGM law itself states that "unique circumstances surrounding the practice of FGM place it beyond the ability of any single state or local jurisdiction to control,"[229] and asserts Congressional power under the Commerce Clause.[230] However, there is no provision or statement in the law which provides the strict "requisite nexus" linking it to interstate commerce apparently required by *Lopez*.

Although it is likely that the Court would not advocate FGM any more than it would endorse the carrying of guns near schools, a ban on FGM may be beyond Congress' Constitutional authority.[231] Columnist James Kilpatrick sums up this point by asking, "how did genital mutilation get to be a FEDERAL crime? The Constitution

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[225] *Id.* at 561.

[226] *Id.*

[227] *Id.* at 567.

[228] *Lopez*, 514 U.S. at 561-62.

[229] Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 § 645(a)(4) (1996).

[230] *Id.* § 645(a)(6).

[231] *See, e.g., Lopez*, 514 U.S. at 561 n.3 (quoting United States v. Emmons, 410 U.S. 396, 411-12 (1973): "When Congress criminalizes conduct already denounced as criminal by the states, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'").

confers no authority whatever for the bill's enactment."[232] On these grounds the law may be found an unconstitutional exercise of the federal government's authority, and may be better left to the jurisdiction of states.

V. INTERNATIONAL ARGUMENTS AGAINST CRIMINALIZATION

> "Even if we disagree with the practice of Female Circumcision, we must remember that the parents who do this are not monsters, but ordinary, decent caring persons." [233]

Most of the arguments opposing the international criminalization of FGM critique the way the West has characterized FGM and its practitioners, or attempted to interfere in the affairs of African countries around this issue.[234] The following section evaluates the relevance of the international arguments against criminalization to the domestic prohibition of FGM. These arguments can be categorized into three basic types:

1) The Prohibition Argument—concern that criminalization will drive FGM underground, thereby making it a greater health hazard and more difficult to eradicate.

2) The Community First Argument—concern that a greater amount of attention is being given to women's bodies or (perceived) lack of sexual freedom, rather than basic economic or social needs.

3) The Paternalistic Argument—concern that criminalization treats practitioners of FGM as either child abusers or misguided victims of false consciousness. This argument advocates letting the women in

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[232] James J. Kilpatrick, *Playing Constitutional Games*, BUFF. NEWS, Dec. 5, 1996, at 3C.

[233] Lane & Rubinstine, *supra* note 4.

[234] *See, e.g.*, Mugo, *supra* note 38; Seble Dawit & Salem Mekuria, *The West Just Doesn't Get It*, N.Y. TIMES, Dec. 7, 1993, at A27, *available in* the LEXIS, News Library, Arcnws file.

the affected communities decide how best to eradicate this practice without Western condemnation.[235]

A. The Prohibition Argument

> "In a culture seen as decadent, rites of purity become more important. . . . The operation [will be] done clandestinely and if the child hemorrhages, the parents will be reluctant to seek medical help in case they are prosecuted."[236]

The main concern of those advancing the prohibition argument is that criminalization will drive FGM underground and discourage people from seeking medical attention for related problems, thereby making it more dangerous. By forbidding the practice, prohibition may actually reinforce FGM as a tie to a former country or culture. A persecuted sacred rite is often more powerful than one that is allowed, but disfavored. Sometimes a rite becomes more powerful and sacred simply because it is outlawed.

The federal law mandates that education and outreach to prevent FGM be done in a non-culturally offensive way,[237] in an attempt to avoid such effects. But the fact remains that the sanctions of the

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[235] Although beyond the scope of this comment, there have been many indigenous efforts in Africa to end FGM. For an account of some of these organizations, activists, and efforts, see WALKER & PARMAR, *supra* note 142, at 241, 280 & 291; Gauch, *supra* note 152; Melvis Dzisah, *Ivory Coast Tackles Female Circumcision*, REUTERS N. AM. Wire, Dec. 13, 1996, *available in* LEXIS, News Library, Reuters File; *Eritrean Youths Combat Health Problems Through Education*, AFRICA NEWS, Feb. 12, 1997; John Lancaster, *Egypt To Enforce Circumcision Ban*, WASH. POST, July 12, 1997, at A17.

[236] Flint, *supra* note 112, at 10 (quoting a midwife working in a London immigrant community).

[237] 8 U.S.C. § 1374(a)(1) (1997). The law provides for "[i]nformation on the severe harm to physical and psychological health caused by female genital mutilation which is compiled and presented in a manner which is limited to the practice itself and respectful to the cultural values of the societies in which such practices take place." *Id.*

law—fines and jail time for parents[238] who believe the rite is necessary for their child—cannot ever be done in a culturally respectful manner. The real question in the United States is whether the law will help end the practice, or merely reinforce its importance. As the prohibition of alcohol in the 1920s demonstrated, and as proponents of drug decriminalization argue today,[239] prohibition *is* an effective method of discouraging an activity.

The results of criminalization efforts in Western Europe provide some indication of whether the measure will be successful in the United States. In the U.K., where female circumcision has been illegal for over 10 years,[240] some health care workers have derided efforts to eradicate the practice through legal measures. They fear criminalization has, perversely, made FGM an even greater health hazard.[241]

Sadia Ahmed, a Somali sociologist based in Great Britain says it is wrong to equate FC with child abuse, "because [FC] is done because people are really afraid for their children. Talking of child abuse and torture puts the community on the defense. It's counter-productive. . . . Governments should put enough resources into educating people, without pointing fingers or putting them on the defensive."[242]

Another potential problem with the federal law from the

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[238] 18 U.S.C. § 116(a) (1997). Section 116(a) provides that "[v]iolators of the law shall be fined under this title or imprisoned not more than 5 years, or both." *Id.*

[239] *See, e.g.*, Dan Herbeck, *Curtin Criticizes Federal Efforts, Says U.S. Should Study Drug Legalization*, BUFF. NEWS, Mar. 2, 1997, at 1B. U.S. District Judge John T. Curtin stated: "in the long run, I think legalization might be a better answer. . . . We're filling jails with our young people, and we're getting nowhere . . . let's shift most of that money to education and counseling . . . ." *Id.* Frederick B. Campbell, *To Control Drugs, Legalize*, N.Y. TIMES, Jan. 23, 1990, at A23. Campbell writes that "[t]he purpose of legalization would be to place better controls on access to such drugs." *Id.*

[240] *See infra* Section III.

[241] *See* Flint, *supra* note 112 (quoting a London midwife: "The operation has to be done clandestinely and if the child hemorrhages, the parents will be reluctant to seek medical help in case they are prosecuted.")

[242] *Id.*

prohibition perspective is that it may discourage parents from taking a circumcised child to the doctor for fear of being reported by health care workers. This is perhaps the most powerful argument against criminalization in the United States. Conversely, several child abuse experts recently commented that doctors may be reluctant to report cases of FGM, for fear of breaking up close knit families and sending well meaning mothers and fathers to prison.[243] This would be a perverse effect of the law, and policy makers need to consider how to counter these possible effects.

As noted in Section I, the federal law does not criminalize taking a child out of the country to have FC performed. One Somali immigrant was quoted recently stating he would do just that if necessary.[244] Both the British and Swedish laws criminalize such acts.[245] If the law is intended to be more than symbolic, legislators need to address this loophole.

Finally, the prohibition argument presents the concern that the law will result in a backlash against those working to end the practice in their native countries. For example, in Sierra Leone, the national council of the *Sowei*, female practitioners of FC, have begun public showings of support for the practice.[246] The Sowei defend it as a sacred rite which gives women a sense of their worth and social values.[247] The president of the National Council of Moslem Women, Hadja Isha Sasso has said, "life will be meaningless if women from

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[243] Dugger, *Tug of Taboos*, *supra* note 25.

[244] *Id.* Ahmed Guled, Somali immigrant and father of 2 daughters, living in Houston, Texas, spoke of FGM as an obligation: "It's [FC] my responsibility. If I don't do it I will have failed my children."

[245] *See infra* Section III.

[246] Rod MacJohnson, *Supporters of Female Excision Fight Back in Sierra Leonne*, AGENCE FRANCE PRESSE, Aug. 30, 1996. *See also Sierra Leone Women March for Female Circumcision*, REUTERS WORLD SERV., Sept. 11, 1996, *available in* LEXIS, News Library, Curnws File; John Lancaster, *Egyptians Stand By Female Circumcisions*, WASH. POST, Nov. 24, 1996, at A33. Lancaster quotes Marie Asaad, the chair of a coalition of Egyptian non-governmental organizations working to end FGM: "Many doctors still believe [FC]is a very important protection against disease and immorality and that talking against it is a Western fad." *Id.*

[247] MacJohnson, *supra* note 246.

the villages are forced to stop this practice."[248]

B. The Community First Argument

> "What these women need is people who will educate them, not only about circumcision, but how to survive and assimilate in American society and still keep their culture and religion."[249]

Many African feminists have argued that basic needs like adequate health care facilities, support for health care training, access to public education for girls, and access to clean water are not treated as human rights concerns of the same urgency as the eradication of [FGM].[250] These women question why FGM receives so much more attention than other problems affecting women, such as illiteracy, malnutrition, lack of access to health care or economic power. Professor Isabelle Gunning has noted, "for the African feminists who clearly agree that the surgeries must be abolished, the practice is viewed as only one of a number of problems besetting women, including poverty, scarce water and land, heat and dust storms, and generally bad health care. The surgeries do not head the list of wrongs that need to be righted to improve the status of women."[251]

This argument is not as relevant to the United States, where women largely have access to such basic needs as free public schools, some measure of health care,[252] and relatively equal opportunities. The danger of criminalization in the West, for those concerned with eradication, is that in the overwhelming influx of American values

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[248] *Id.*

[249] Dugger, *Tug of Taboos*, *supra* note 25 (quoting Miriam Diria, Somali immigrant social worker.)

[250] Lewis, *supra* note 5, at 44.

[251] Gunning, *supra* note 5, at 228.

[252] However, with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996), immigrants' access to health care may be severely limited. *See* 8 U.S.C. § 1611 (1997).

and culture, parents will hold on to FGM as a way to keep structure and tradition in their family.[253]

C. The Paternalistic Argument

> "One woman [from Sierra Leone], felt people were looking at her and talking to her as if all she was a big genital that had been mutilated."[254]

> "Even some [African immigrants] opposed to the practice say they are offended that Congress adopted a law that seems specifically directed at Africans, rather than relying on general statutes prohibiting violence against children . . ."[255]

The paternalism argument also shifts in the domestic context. It can be argued that many laws currently in effect are paternalistic, especially those concerning treatment of children.[256] A more relevant rephrasing of this argument is that the domestic law is unnecessary because existing child abuse laws can be used to protect children from harm, tinging passage of this law with an anti-African immigrant bias.[257]

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[253] *See, e.g.*, Lancaster, *supra* note 246. Lancaster quotes an Egyptian high-school teacher: "Europe and the U.S. need it [FC] more than we do. They wouldn't have AIDS and all these other problems." *Id.*

[254] Dugger, *Tug of Taboos*, *supra* note 25 (quoting Joanne D'Alisera, an anthropologist working with Sierra Leone immigrants).

[255] *Id.*

[256] *See, e.g.*, N.Y. SOC. SERV. LAW § 413; and N.Y. EDUC. LAW § 914 (McKinney 1996) (requiring immunization of all school-age children).

[257] Senator Reid stated, "This barbaric practice is now being conducted in the U.S. because of the inflow of people from around the world . . . we need to . . . insist upon aggressive education of communities, especially African communities that practice it, as well as implementation of laws prohibiting it." 142 CONG. REC. S.8972 (1996). *See also* Ed Vogel, *Legislature To Discuss Proposal Against Female Genital Mutilation*, LAS VEGAS REV. J., Apr. 5, 1997, at 6B. Vogel quotes state Senator Ray Rawson, on the reasons why a Nevada FGM law is necessary:

Many of the accounts of women who continue this practice say they realize it is problematic and painful, but the ramifications for not doing it, the social outcast and shame, make continuation a rational choice.[258] However, with the relatively small number of immigrants from FC practicing countries, and the high assimilation rates of immigrants into American culture,[259] the social stigma of not being circumcised may not be nearly as great in the United States. If the goal is to end the practice, viewing the women who continue it as misguided or evil rather than understanding the way they view FC and how it fits into the larger context of their lives is counterproductive. Passing a law specifically against this practice rather than enforcing child abuse laws, where applicable, seems to target certain cultures and peoples in a racist and anti-immigrant manner.

VI. CONCLUSION

The United States' attempt to criminalize FGM may, in the end, be more symbolic than pragmatic. The law's failure to provide for reporting requirements and enforcement mechanisms, along with its significant loopholes may hamper efforts to eradicate the practice. The passage of the law was passed on the federal level, while the majority of family, health, and criminal matters are regulated by the states, reinforces the view that the federal law is political grandstanding rather than a genuine effort at eradicating FGM. The

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"Nevada is a cosmopolitan state. More and more immigrants are coming from Africa." *Id.*

[258] *See, e.g.*, Dzisah, *supra* note 235. One twelve year old Ivory Coast girl said, "It was painful but I had no choice, since without it I was not going to get a husband." *Id. See also* Lane et al., *supra* note 4, at 36. Lane writes that "economic insecurity made it extremely unlikely that parents would risk leaving their daughters uncircumcised." *Id.*

[259] *See* Dugger, *Tug of Taboos*, *supra* note 25. Dugger writes that "the population from African nations where genital cutting is common are scattered across the U.S., they live in Houston, as well as Los Angeles, New York, Washington, Chicago, Philadelphia and Atlanta." *Id.*

manner in which the law is directed at a particular religious and cultural immigration population adds to the perceived cultural bias of the law. State laws which address FGM on the same level as the vast majority of health and family issues, may be the most effective to both lessen the prohibition backlash and meet the greater goal of protecting children.